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No. 935

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NATIONAL DAIRY PRODUCTS CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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Dated: February 23, 1968

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I. THE GOVERNMENT'S CONTENTION THAT THIS CASE RAISES NO ISSUE CONCERNING THE INTERPRETATION OF DENNIS

The Brief for the United States in Opposition[1] is in error in asserting (GB 10) that the present case "raises no issue concerning interpretation of this Court's *Dennis* decision."[2] The government reaches this conclusion only by ignoring the two key points which place this case at odds

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1. Hereinafter cited "GB. . . ." The Petition for a Writ of Certiorari is cited "Pet. . . ." and the Appendix thereto as "App. A. . . ."

2. Dennis v. United States, 384 U.S. 855 (1966).

with *Dennis* and decisions in the Second, Tenth and District of Columbia Circuits (see Pet. 15 n.20 and accompanying text) and create a potential impact of major proportions for future cases in the Eighth Circuit and the as yet uncommitted circuits.

These two points—the sufficiency of other evidence to support the verdict and the amount of aid received by the government from its use of the grand jury transcript—are irrelevant considerations under *Dennis* (Pet. 16-17). Yet, as to Counts 1-10, there can be no question that these factors were given controlling effect by the court below. The effect given the "sufficiency of the evidence" factor appears in the portion of the opinion quoted at GB 12. The effect given the "aid to the government" factor appears in the opinion of the Court of Appeals immediately preceding the quotation set forth on GB 12. There the court commented that the refreshment procedure did not prejudice petitioner's rights as to Counts 1-10 because of the limited effectiveness of the refreshment procedure (App. A-10).

If the district courts in the Eighth Circuit and other circuits which have not yet spoken apply the standards used by the Court of Appeals in affirming Counts 1-10, the rule in *Dennis* would be circumvented, the withholding of the transcript from the defense legitimatized, despite "particularized need," and the existing conflict among the circuits expanded.

The government is also in basic error in this case in asserting that "the court below was justified in invoking the harmless error rule" (GB 13). The trial court's error—in Counts 1-10 as well as Counts 11-13—lay not in receiving the refreshment testimony, but in foreclosing the defense from a "storehouse of relevant fact" to which the government had "exclusive access" (see *Dennis*, 384 U.S. at 873).

Accordingly, the prejudice to the defense is measured not by the impact of the refreshment testimony, but by the disadvantage which petitioner suffered from being foreclosed from additional refreshment material which might have enabled defense counsel to obtain on cross or redirect examination exculpatory or explanatory testimony to counteract or neutralize that adduced by the prosecution.

Given disclosure, no one can say what different or additional testimony the defense might have been able to adduce, or what impact such testimony might have had upon the jury as to all the market areas. Therefore, whether the refreshment process helped the government "in only three instances," in "six other instances" where the witnesses accepted their grand jury testimony as being true, or in all of "the only twenty-four instances" where refreshment was attempted (GB 12), is entirely beside the point. Application of the harmless error rule in such case, we submit, is directly contrary to the letter as well as the spirit of this Court's unanimous decision in *Dennis*.

II. THE GOVERNMENT'S CONTENTION THAT THE NON-DISCLOSURE ERROR TAINTED ONLY COUNTS 11-13

The government seeks to justify the action of the court below in completely divorcing Counts 1-10 from Counts 11-13 so far as the refreshment witnesses are concerned (GB 9-10). The government's argument that the refreshment witnesses testified "primarily" as to Counts 11-13 (App. A-10; GB 2, 9) is a grudging admission that the testimony "spilled over and infected all counts" (*cf.* App. A-9). The government totally points to the existence of a single overall intent, allegedly predatory and directed at small dairymen who sold low-priced milk in gallon jugs (GB 4).

This was also the government's position at the trial, and it is idle for it now to deny that its attorneys had one theory of guilt for both the distributor and the Kansas City counts, or that the evidence thereon—coalesced by the trial court's instructions on intent—was not inextricably intertwined (GB 10-11).

For example, beginning the closing arguments, chief trial counsel for the government stated (Tr. 6777-79):

> "National couldn't allow the public . . . [low milk prices]. So what did National do? In each of the markets covered by our indictment, National lowered its price below its cost to eliminate . . . [those low prices]; that is, to eliminate either the gallon jug or to whip into line the local dairy whose milk gave the consumer a way out from the price that National wanted to get from him.
>
> • • •
>
> "In each of these markets, the Defendant National has engaged in these outlawed predatory acts to eliminate or control the cause of competition in that market."

An example of the close links between the Kansas City counts (11-13) and the distributor counts is found in the evidence that the price put into effect in Kansas City in July 1958 went into effect one day later in Paola, Kansas (Counts 1 and 2). The government urged in its post-trial brief:

> "the jury was entitled to consider, as bearing upon National's intent, the earlier evidence reflecting National's motive in dropping prices in Kansas City as a means of destroying competition by whipping the smaller dairies into line. . . . The fact that Sealtest brought the Kansas City price into Paola . . . confirms

the fact that its purpose was to destroy competition in Paola . . . as in Kansas City. . . ."[3]

The jury was not only "entitled to" consider the evidence as to petitioner's intent in Kansas City in deliberating upon the Paola counts, as the government asserted, but the trial court specifically authorized it to consider in *each* count earlier evidence of petitioner's intent received in other counts (see App. A-280—A-284). And since (contrary to GB 11), the refreshment procedure did involve testimony as to National's intent in setting its prices (Pet. 9-10), and since numerous other factors embrace all the counts (Pet. 7-11, 17-18), the non-disclosure error as to Kansas City Counts 11-13 directly tainted the distributor counts.[4]

III. THE GOVERNMENT'S CONTENTION THAT PETITIONER HAD "NO VALID REASON" FOR FAILING TO MOVE AT TRIAL TO INSPECT THE TRANSCRIPTS OF NON-REFRESHMENT WITNESSES

The government asserts that petitioner has given "no

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3. Government's Memorandum in Opposition to the Defendants' Motions for Judgments of Acquittal Notwithstanding the Verdicts and for a New Trial, XII Pl. 2157 at p. 2183. Counts 12 and 13 were also bracketed with Counts 1 and 2 in government counsel's argument to the jury (Tr. 6834, 6838, 6858).

4. Admitting that Sealtest Sales Manager Baird's testimony related to all counts, the government mistakenly asserts that the testimony of Sealtest General Manager Stewart was "limited" to the Kansas City counts (GB 9-10 n. 4). Stewart's testimony included the subject of Sealtest's general pricing policies—particularly in relation to gallon jugs and the reasons why Sealtest did not itself market a gallon jug—and this testimony bore importantly upon the basic intent issue in all counts (see, *e.g.*, Tr. 6174-79, 6185-86, 6268-70; see also Tr. 6292-95, 6351). In addition,

(continued on next page)

valid reason" for not moving during trial to inspect grand jury transcripts of non-refreshment witnesses, and that "there is no reason to assume that the trial judge here would not have conducted an *in camera* inspection for inconsistencies upon timely motion" (GB 15 and n. 9). It ignores the three cases in the Eighth Circuit cited in the petition (Pet. 21 n. 29) which were decided only two or three years before the time of trial (and in one of which this Court had denied certiorari—*Berry* v. *United States,* 368 U.S. 955 (1962)). These decisions precluded a defendant from obtaining the transcripts of non-refreshment witnesses unless he was able to make an independent showing of inconsistencies.[5] Disclosure motions by defense counsel in disregard of those governing precedents not only would have been futile, in light of the trial judge's rulings as to the refreshment witnesses (he was "not at all sure that [such disclosure] might not actually be error"—App. A-167), but irritating to the court.

Here, just as in *O'Connor* v. *Ohio,* 385 U.S. 92 (1966) (Pet. 22-23), the fact that the Eighth Circuit's long-standing practice was not overturned until after the trial herein (but before judgment became final) should not, in justice and fairness, be permitted to deprive petitioner of a trial under the liberalized disclosure rule of *Dennis.* Particularly is this so because this Court remanded this case "for further consideration in light of *Dennis.*"

(continued from preceding page)
Stewart testified specifically as to Sealtest's part in a highly controversial "2 for 1 sale" conducted by Fleming Stores in both Kansas City and rural areas (see Tr. 6164-66, 6331-37; *cf.* GX 156-D; Tr. 276-77, 549-56, 1050-57, 3326-27, 5236-38).

5. The Tenth Circuit in *Dennis,* 346 F.2d 10, 17-18 (10th Cir. 1965), recognized that this bar existed in the Eighth Circuit, citing *Berry,* and the Eighth Circuit did not eliminate the inconsistency requirement until this Court had handed down its *Dennis* decision (see App. A-6, A-8).

IV. THE GOVERNMENT'S CONTENTION THAT THE TRIAL COURT PROPERLY CHARGED THE JURY AS TO THE ELEMENTS OF A ROBINSON-PATMAN OFFENSE

In contending that the trial court properly instructed the jury that it must find both "unreasonably low prices" and a "specific intent to destroy competition" (GB 16), the government ignores the prolix and confusing nature of the whole Robinson-Patman aspect of the trial court's charge and the fact that the trial court digressed into incomplete descriptions of decisions of this Court, reports of Congressional committees, and pricing in the gasoline industry (App. A-289—A-292, A-294) in the course of its discussion of unreasonableness and intent. It will not do to say that Justice Holmes' illustration of the workman on the housetop has to do with reasonableness rather than intent (GB 17). The example winds up with the statement that if the workman carelessly throws a beam into a busy street, resulting in death, "he is dealt with as he foresaw it. . . . he is guilty of murder" (App. A-296). Even a jury of laymen must be assumed to connect murder with "intent to kill," and certainly such an intent in the example must be a "presumed" rather than a "specific intent" (*cf.* App. A-296 n.). And considering the fact that the workman example followed hard upon an instruction that the jury's "ultimate duty [was] to determine . . . whether the prices . . . were or were not unreasonably low" (App. A-295), it is plain that the trial court's instructions fell below the constitutional as well as the statutory standard laid down by this Court for this case (see Pet. 24-26). Certainly, this Court should not permit these instructions to stand as a precedent in this novel area of the law.

CONCLUSION

For all the reasons hereinabove set forth and in the earlier petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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